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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 UNITED STATES OF AMERICA,

Case No. 2:16-cr-00046-GMN-PAL

8 Plaintiff,

9 v.

10 AMMON E. BUNDY,

11 Defendant.

**ORDER
-and-
REPORT OF FINDINGS AND
RECOMMENDATION**

12 Before the court is Defendant Ammon E. Bundy's ("Ammon Bundy") Motion to Dismiss
13 the Indictment for Destruction of Evidence or in the Alternative for a Remedial Jury Instruction
14 (ECF No. 833) which was referred for a Report of Findings of Recommendation pursuant to 28
15 U.S.C. § 636(b)(1)(B) and LR IB1-4 of the Local Rules of Practice. The court has considered the
16 Motion, Supporting Declaration of Keith Gordon, the Motions for Joinder by Stewart, Mel Bundy,
17 Payne, McGuire, Parker, Cliven Bundy, Woods, and O'Shaughnessy (ECF Nos. 859, 860, 861,
18 873, 883, 890, 899, 904), the Government's Response (ECF No. 948), Supporting Declaration of
19 Kent Kleman, Sealed Exhibit (ECF No. 949), and Ammon Bundy's Reply (ECF No. 1021).

20 **BACKGROUND**

21 **I. The Indictment**

22 Defendants Ammon Bundy and 18 co-defendants are charged in a Superseding Indictment
23 (ECF No. 27) returned March 2, 2016. Ammon Bundy is charged in 16 counts with:

- 24 • Count One – Conspiracy to commit an offense against the United States in violation of 18
25 U.S.C. § 371. This charge arises from conduct that allegedly occurred sometime between
26 March of 2014 and March 2, 2016.
27 • Count Two – Conspiracy to impede or injure a federal officer in violation of 18 U.S.C.
28 § 372. This charge arises from conduct that allegedly occurred sometime between March
of 2014 and March 2, 2016.

- 1 • Count Three – Use and carry of a firearm in relation to a crime of violence in violation of
2 18 U.S.C. § 924(c) and § 2. This charge arises from conduct that allegedly occurred
sometime between March of 2014 and March 2, 2016.
- 3 • Count Four – Assault on a federal officer in violation of 18 U.S.C. § 111(a)(1), (b) and § 2.
4 This charge arises from conduct that allegedly occurred on April 9, 2014.
- 5 • Count Five – Assault on a federal officer in violation of 18 U.S.C. § 111(a)(1), (b) and § 2.
6 This charge arises from conduct that allegedly occurred on April 12, 2014.
- 7 • Count Six – Use and carry of a firearm in relation to a crime of violence in violation of 18
8 U.S.C. § 924(c) and § 2. This charge arises from conduct that allegedly occurred on April
9 12, 2014.
- 10 • Count Seven – Threatening a federal law enforcement officer, in violation of 18 U.S.C.
11 § 115(a)(1)(B) and § 2. This charge arises from conduct that allegedly occurred on April
12 11, 2014.
- 13 • Count Eight – Threatening a federal law enforcement officer in violation of 18 U.S.C.
14 § 115(a)(1)(B) and § 2. This charge arises from conduct that allegedly occurred on April
15 12, 2014.
- 16 • Count Nine – Use and carry of a firearm in relation to a crime of violence in violation of
17 18 U.S.C. § 924(c) and § 2. This charge arises from conduct that allegedly occurred on
18 April 12, 2014.
- 19 • Count Ten – Obstruction of the due administration of justice in violation of 18 U.S.C.
20 § 1503 and § 2. This charge arises from conduct that allegedly occurred on April 6, 2014.
- 21 • Count Eleven – Obstruction of the due administration of justice in violation of 18 U.S.C.
22 § 1503 and § 2. This charge arises from conduct that allegedly occurred on April 9, 2014.
- 23 • Count Twelve – Obstruction of the due administration of justice in violation of 18 U.S.C.
24 § 1503 and § 2. This charge arises from conduct that allegedly occurred on April 12, 2014.
- 25 • Count Thirteen – Interference with interstate commerce by extortion in violation of 18
26 U.S.C. § 1951 and § 2. This charge arises from conduct that allegedly occurred between
27 April 2, 2014, and April 9, 2014.
- 28 • Count Fourteen – Interference with interstate commerce by extortion in violation of 18
U.S.C. § 1951 and § 2. This charge arises from conduct that allegedly on April 12, 2014.
- Count Fifteen – Use and carry of a firearm in relation to a crime of violence in violation of
18 U.S.C. § 924(c) and § 2. This charge arises from conduct that allegedly occurred on
April 12, 2014.
- Count Sixteen – Interstate travel in aid of extortion in violation of 18 U.S.C. § 1952 and
§ 2. This charge arises from conduct that allegedly occurred sometime between April 5,
2014 and April 12, 2016.

The Superseding Indictment (ECF No. 27) in this case arises out of a series of events related to a Bureau of Land Management (“BLM”) impoundment of Cliven Bundy’s cattle following a two-decade-long battle with the federal government. Beginning in 1993, Cliven

1 Bundy continued to graze cattle on land commonly referred to as the “Bunkerville Allotment”
2 without paying required grazing fees or obtaining required permits. The United States initiated
3 civil litigation against Cliven Bundy in 1998 in the United States District Court for the District of
4 Nevada. The court found that Cliven Bundy had engaged in unauthorized and unlawful grazing
5 of his livestock on property owned by the United States and administered by the Department of
6 the Interior through the BLM. The court permanently enjoined Cliven Bundy from grazing his
7 livestock on the Allotment, ordered him to remove them, and authorized the BLM to impound any
8 unauthorized cattle. Bundy did not remove his cattle or comply with the court’s order and
9 injunction. The United States went back to court. Subsequent orders were entered in 1999 and
10 2013 by different judges in this district permanently enjoining Bundy from trespassing on the
11 Allotment and land administered by the National Park Service (“NPS”) in the Lake Mead National
12 Recreation Area¹, ordering Bundy to remove his cattle, and explicitly authorizing the United States
13 to seize, remove, and impound any of Bundy’s cattle for future trespasses, provided that written
14 notice was given to Bundy.

15 On February 17, 2014, the BLM entered into a contract with a civilian contractor in Utah
16 to round up and gather Bundy’s trespass cattle. BLM developed an impoundment plan to establish
17 a base of operations on public lands near Bunkerville, Nevada, about 7 miles from the Bundy ranch
18 in an area commonly referred to as the Toquop Wash. On March 20, 2014, BLM also entered into
19 a contract with an auctioneer in Utah who was to sell impounded cattle at a public sale. Bundy
20 was formally notified that impoundment operations would take place on March 14, 2014. The
21 following day, Bundy allegedly threatened to interfere with the impoundment operation by stating
22 publicly that he was “ready to do battle” with the BLM, and would “do whatever it takes” to protect
23 “his property.” The superseding indictment alleges that after being notified that BLM intended to
24 impound his cattle, Bundy began to threaten to interfere with the impoundment operation, and
25 made public statements he intended to organize people to come to Nevada in a “range war” with
26 BLM and would do whatever it took to protect his cattle and property.

27
28 ¹ By 2012, Bundy’s cattle had multiplied and he also began grazing his cattle on land administered by the
NPS in the Lake Mead National Recreation Area without obtaining grazing permits or paying grazing fees.

1 The superseding indictment alleges that, beginning in March 2014, the 19 defendants
2 charged in this case planned, organized, conspired, led and/or participated as followers and
3 gunmen in a massive armed assault against federal law enforcement officers to threaten, intimidate,
4 and extort the officers into abandoning approximately 400 head of cattle owned by Cliven Bundy.
5 The removal and impoundment operation began on April 5, 2014. On April 12, 2014, defendants
6 and hundreds of recruited “followers” executed a plan to recover the cattle by force, threats, and
7 intimidation. Defendants and their followers demanded that officers leave and abandon the cattle
8 and threatened to use force if the officers did not do so. The superseding indictment alleges armed
9 gunmen took sniper positions behind concrete barriers and aimed their assault rifles at the officers.
10 Defendants and their followers outnumbered the officers by more than 4 to 1, and the potential
11 firefight posed a threat to the lives of the officers, as well as unarmed bystanders which included
12 children. Thus, the officers were forced to leave and abandon the impounded cattle.

13 After the April 12, 2014 confrontation with federal officers, the superseding indictment
14 alleges that the leaders and organizers of the conspiracy organized armed security patrols and
15 check points in and around Cliven Bundy’s Bunkerville ranch to deter and prevent any future law
16 enforcement actions against Bundy or his co-conspirators, and to protect Bundy’s cattle from
17 future law enforcement actions.

18 **II. The Parties’ Positions**

19 **A. The Motion to Dismiss**

20 Ammon Bundy seeks an order dismissing the superseding indictment for destruction of
21 evidence, or in the alternative, a remedial jury instruction. The motion claims that on April 12,
22 2014, after Sheriff Doug Gillespie announced that the impoundment operations were to cease, the
23 BLM left the Toquop Wash. It left behind large trash bags full of thoroughly shredded documents
24 which were subsequently retrieved. The documents were thoroughly shredded, but shredded
25 segments remained which confirm that they were once government documents. Ammon Bundy
26 argues that the government’s destruction of the documents is a due process violation which
27 mandates dismissal if the government acted in bad faith, and the government was aware of the
28 apparent exculpatory value of the evidence at the time it was lost or destroyed. Additionally, he

1 acknowledges he must show that the missing evidence is of such a nature that he would be unable
2 to obtain comparable evidence by other reasonably available means. If the missing evidence is
3 shown to be “potentially useful” rather than demonstratively exculpatory, Bundy must show bad
4 faith on the part of the government before dismissal is warranted.

5 In this case, the court should dismiss the indictment, Ammon Bundy argues, because the
6 government knew charges were coming, but intentionally destroyed documents that could have
7 exonerated him. The documents the government shredded were voluminous. They were authored
8 in the course of the BLM operation that resulted in this case, and therefore necessarily contained
9 written statements of potential government witnesses. Bundy argues that the likelihood that they
10 contained exculpatory material is high, the likelihood that they contain impeachment material is
11 higher, and that it is a certainty the documents were potentially useful. The shreds that were
12 recovered indicate that hand-written notes by potential witnesses were among the documents that
13 were destroyed. These documents are lost forever. The government was aware of the exculpatory
14 value of the documents when they were destroyed, and Ammon Bundy cannot obtain comparable
15 evidence. The indictment must therefore be dismissed.

16 If the court does not find that the government acted in bad faith, a remedial jury instruction
17 is required to hold the government accountable. Bad faith is not required for the court to give a
18 remedial jury instruction. Here, the documents were shredded while in the government’s custody
19 in disregard for Ammon Bundy’s rights and interests. The government failed to adhere to establish
20 standards of care, and the destruction of the documents was deliberate. As a result, Ammon Bundy
21 has been prejudiced because the evidence no longer exists by other reasonably available means.
22 The state of mind of the agents during the events charged in the superseding indictment is crucial
23 to allegations of assault and intimidation of the very government agents who shredded the
24 documents. Accordingly, if the court finds there was no bad faith, a remedial jury instruction is
25 warranted.

26 The motion is supported by exhibits showing trash bags full of shredded documents and a
27 BLM memo, which was apparently produced in discovery in this case. The memo demonstrates
28 that BLM recognized the right to peacefully gather and protest under the First Amendment.

1 However, it also demonstrates that BLM concluded that peaceful protests had crossed into illegal
2 activity. The memo outlines alleged illegal activity and demonstrates that the government
3 anticipated that charges would be brought. The motion is also supported by the declaration of
4 Keith Gordon, who avers he is a licensed private investigator retained by Ammon Bundy's counsel
5 in this case. Declaration (ECF No. 833-3) ¶ 2. On August 18, 2016, he traveled to Bunkerville,
6 Nevada to review, scan, and photograph the contents of various dumpsters left behind by BLM
7 after they abandoned their impoundment operations on April 12, 2014. *Id.* ¶ 3. He avers on
8 information and belief the dumpsters were empty when Virgin Valley Disposal provided them to
9 the BLM on April 14, 2014, and that all of the contents recovered from the dumpsters were
10 deposited there by BLM agents or other federal agencies. *Id.* ¶¶ 4–5. On information and belief,
11 “the contents recovered from the dumpsters have been carefully and securely stored under lock
12 and key since April 2012 and remain in the same state as when they were recovered.” *Id.* ¶ 6. He
13 took the photographs that are attached to Ammon Bundy's motion to dismiss. *Id.* ¶¶ 7–8.

14 **B. The Government's Response**

15 The government opposes the motion arguing it is based on unsupported claims that
16 shredded documents left behind when the BLM was forced to abandon the impoundment site were
17 potentially useful to the defense or contain written statements from law enforcement reflecting
18 their state of mind. The government attaches the declaration of Bureau of Land Management
19 Assistant Special Agent in Charge (“ASAC”) Kent Kleman, and an FD-302 summary (“302”) of
20 an interview of a Deputy Chief Ranger involved in the impoundment operations on April 12, 2014,
21 as Exhibit B to the government's response. The government argues that the declaration and 302
22 make clear that documents were shredded at the impound site on April 11 and 12, 2014, as a result
23 of an imminent assault on the site and immediate need for officers to prevent disclosure of law
24 enforcement sensitive information to persons engaged in criminal activity.

25 The government argues that Bundy has failed to establish that any of the documents that
26 were shredded are the least bit helpful to him, or that any of the unidentified documents are not
27 otherwise obtainable from another source. Finally, the government argues Bundy fails to show

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1 that officers were not executing their duties by shredding the unidentified documents under the
2 circumstances created by the defendants' criminal activity.

3 Ammon Bundy cannot show that the documents that were shredded were potentially useful,
4 or the two requirements to establish a due process violation, *i.e.*, bad faith on the part of law
5 enforcement, or that the missing evidence is of such a nature that he would be unable to obtain
6 comparable evidence by other reasonably available means. Rather, Bundy only speculates that the
7 shredded documents were potentially useful, which is legally insufficient. The government
8 maintains that whatever was shredded in this case was not exculpatory as shown by the declaration
9 of ASAC Kleman. The shredded material consisted almost entirely of: (1) law enforcement's non-
10 discoverable personal information; and (2) confidential, non-discoverable operations plans for the
11 impoundment operation. The documents were shredded 22 months before those who shredded
12 them knew who was going to be indicted or which crimes they were going to be charged with.
13 Therefore, Bundy cannot show that the officers acted in bad faith. Bundy also cannot establish
14 that the agents deliberately shredded documents that they knew on April 11–12, 2014, would be
15 exculpatory. To prevail on a bad faith destruction case, a defendant must show that the exculpatory
16 value was apparent before destruction. The declaration and supporting 302 establish that the
17 documents were shredded pursuant to a duty to protect personal and confidential information from
18 falling into the hands of unauthorized persons who, at the time, were also engaged in criminal
19 activity.

20 The government contends that the documents were shredded pursuant to the requirements
21 of the Criminal Justice Information Act, which protects all data necessary for law enforcement
22 including biometric, identity, history, person, organization, property, and case/incident data from
23 disclosure. The shredded documents contained personal information about government employees
24 and contractors, including cell phone numbers and addresses. The shredded documents also
25 contained confidential law enforcement information such as tactics and radio frequency lists.

26 The government also argues that Bundy is not entitled to a destruction of evidence jury
27 instruction. In the Ninth Circuit, such instructions are given only where the government's culpable
28 conduct outweighs the prejudice suffered by the defendant. Bundy has not established the factors

1 the court is to consider. The government maintains that it acted in good faith pursuant to legitimate
2 law enforcement duties. The government represents that most of the shredded material is
3 duplicative.

4 The declaration of Kent Kleman avers that he is a criminal investigator for the Bureau of
5 Land Management who is currently an Assistant Special Agent in Charge, and has been employed
6 in federal law enforcement for 20 years. Declaration (ECF No. 948-1) ¶ 1. In May 2014, he was
7 assigned to participate in the investigation of Cliven Bundy and others who were involved in the
8 assaults of federal law enforcement officers in April 2014, near Bunkerville, Nevada. *Id.* ¶ 2. He
9 was not present in Bunkerville, Nevada during any of the events he was investigating, but has
10 continued to work on this investigation since May 2014. *Id.* He reviewed Bundy's motion and
11 attached exhibits. *Id.* ¶ 3. He spoke to several federal employees who were present during the
12 cattle impound operation, including the lead radio dispatcher and several members of law
13 enforcement command staff. *Id.* He also reviewed a written report of one of the federal law
14 enforcement command staff that describes the destruction of information at the incident command
15 post in April 2014. *Id.* He determined that federal employees were involved in shredding
16 documents at the command post during the impoundment operation. *Id.* ¶ 4.

17 Two categories of documents were shredded. Law enforcement dispatch printouts and
18 duplicate daily incident progress summary documents were shredded daily. *Id.* ¶ 4(A). Duplicate
19 copies of potential threat information and other informational bulletins that were disseminated to
20 law enforcement officers on site regarding the buildup of Cliven Bundy's armed followers were
21 shredded daily. *Id.* Summaries/briefing documents regarding the progress of the impoundment
22 that were generated and disseminated in printed format were shredded. *Id.* Second, starting on
23 the night of April 11, 2014, there was a hurried shredding effort of duplicate copies of the impound
24 operations plan, maps and papers containing personal information of government employees and
25 contractors associated with the impoundment operation. *Id.* ¶ 4(B). The documents were
26 shredded in response to information received by law enforcement officers that led them to believe
27 the command post was in imminent danger of being overrun by armed followers of Cliven Bundy.
28 *Id.* The command post trailers were filled with duplicate copies of the plans, maps, and personal

1 information used in conducting the impoundment operation, and the officers believed they had an
2 obligation to protect this information from falling into the hands of those who actively oppose the
3 impoundment operation. The shredding began the night of April 11, 2014, and continued until the
4 officers were forced to abandon the command post on the afternoon of April 12, 2014. *Id.* This
5 shredding was done by dispatch personnel and senior members of the law enforcement command
6 staff. *Id.*

7 He examined Exhibit A to Bundy's motion to dismiss which shows photographs of a bag
8 of shredded documents, and remnants of shredded papers with partial or complete words, phrases,
9 and numbers on them. *Id.* ¶ 5. Based on his knowledge of the case, he recognized many of the
10 specific words, phrases and numbers as names of federal officer participants, officer team
11 assignments, officer cell phone numbers, and references to radio frequency lists. *Id.* This
12 information was contained in a confidential operations plan that not only detailed how the
13 government planned to carry out the cattle impoundment, but also included detailed personal
14 information of government employees and contractors involved. *Id.* The government considers
15 the master planning document to be confidential as it contains sensitive information about officer
16 identities and law enforcement tactics. *Id.* ¶ 6. The fact that he could locate words and numbers
17 from the operation plan from photographs and Exhibit A independently corroborates the
18 statements of employees he spoke with who stated the documents they were shredding were mostly
19 duplicate copies of the operations plan. *Id.* ¶ 7. Law enforcement dispatch information is required
20 to be shredded pursuant to U.S. Department of Justice policy regarding security requirements of
21 Criminal Justice Information ("CJI") *Id.* ¶ 8. The policy requires that CJI be accessed only by
22 authorized individuals, and identifies shredding or incineration as the only two acceptable methods
23 of destruction once the information is no longer needed in physical form. *Id.*

24 With respect to other documents that were shredded, he learned it was done because the
25 documents contained personal information about government employees and contractors such as
26 cell phone numbers and addresses, and confidential law enforcement information such as tactics
27 and radio frequency lists. *Id.* ¶ 9. Some shredded pieces of paper in the photos "appear to have
28 handwriting on them as opposed to typed words generated on a computer printout." *Id.* ¶ 10. He

1 “was not able to determine what those hand-written papers were or what was written on them.” *Id.*
2 Officers and dispatchers who shredded the documents did not receive a subpoena to preserve
3 documents or to preserve them prior to shredding them on April 11–12, 2014. *Id.* ¶ 12. His
4 investigation of Bundy’s motion reveals that the document shredding by government officials was
5 not conducted in bad faith or to hide exculpatory information that would have been useful to the
6 defense. *Id.* It was done pursuant to long-established policies regarding protection of law
7 enforcement sensitive information. *Id.*

8 **C. Ammon Bundy’s Reply**

9 The reply argues the government failed to address all of the documents the evidence shows
10 were shredded, misconstrued the standard for bad faith, and incorrectly heightened Ammon
11 Bundy’s burden to an impossible bar. First, Bundy argues that the government ignores what
12 everyone agrees were destroyed—handwritten notes coming from the BLM’s base camp. Agent
13 Kleman concedes he was not able to determine what those handwritten papers were from, or what
14 was written on them. Therefore, Ammon cannot be faulted for being unable to detail the contents
15 of the notes. Kleman was somehow able to track down and speak to individuals who shredded
16 documents. The court can infer the notes were potentially useful, and the contents of the notes can
17 be explored more fully at an evidentiary hearing. The reply argues that the government cannot
18 destroy notes by percipient witnesses made during the alleged crime so early that no one ever
19 knows definitively what was in them other than the authors, and then shrug the destruction off
20 “because the defendant cannot meet some particularized burden invented by the government.”

21 Second, Bundy argues that Special Agent Kleman’s affidavit states only that most of the
22 shredded documents were non-discoverable, duplicate documents. Only an evidentiary hearing
23 will establish whether this is true. Third, the government’s reliance on the Criminal Justice
24 Information Service Security Policy lacks merit. Nothing in the policy specifies that the
25 documents needed to be shredded at the time they were shredded at the BLM’s base camp. The
26 court should therefore dismiss the indictment because the government knew charges were coming,
27 and intentionally destroyed documents that were potentially useful to the defense. Although the
28 documents were shredded before the indictment was returned, and the government “waited an

1 eternity” before seeking an indictment, its delay does not justify the destruction. The BLM’s own
2 internal memoranda during the protest indicated a belief that the protestors had engaged in criminal
3 activity. Ammon Bundy claims that the shredded hand-written notes contained witness statements,
4 which would ordinarily be statements under Jencks, *Brady* and *Giglio*. The notes could also have
5 been potentially invaluable impeachment material as they may have reported the witnesses’ state
6 of mind during the very time the notes were produced. Ammon Bundy is not able to obtain
7 comparable evidence by other reasonably available means.

8 In the alternative, Bundy requests a remedial jury instruction. He points out that the Ninth
9 Circuit has held that a defendant is not required to show bad faith to be entitled to a remedial jury
10 instruction. Rather, the court engages in a balancing test. The court must balance the quality of
11 the government’s conduct against the degree of prejudice to the accused, with the government
12 bearing the burden of justifying its conduct and the accused demonstrating prejudice. The reply
13 argues that the government has not met its burden because the BLM had a “veritable village” at
14 the impoundment site, had at least 10 trailers, 10 tents, and countless vehicles, and was escorted
15 away from the wash by LVMPD vehicles. Under these circumstances, the government cannot
16 justify why the documents were not simply transported away from Bunkerville with everything
17 else.

18 More importantly, the security policy forbade the agents from shredding hand-written notes
19 unless they were copies. There is no substitute for the hand-written notes, and Ammon Bundy has
20 lost untold impeachment materials. He is entitled to vigorously cross-examine all witnesses with
21 their prior statements. The court should therefore dismiss the superseding indictment for due
22 process violations, or in the alternative, give a remedial jury instruction. The reply also requests
23 that the court conduct an evidentiary hearing on the motion because the motion is supported by
24 sufficient contested facts, that if true, would entitle him to relief.

25 DISCUSSION

26 **I. Applicable Law**

27 In *California v. Trombetta*, 467 U.S. 479, 486 (1984), the Supreme Court addressed, for
28 the first time, “the government’s duty to take affirmative steps to preserve evidence on behalf of a

1 criminal defendant.” It held that the Due Process Clause requires the government to preserve
2 evidence “that might be expected to play a significant role in the suspect’s defense.” However, it
3 held that the government’s failure to preserve evidence amounts to a due process violation only if
4 the evidence that was not preserved: (1) “possesses an exculpatory value that was apparent before
5 the evidence was destroyed”; and (2) was “of such a nature that the defendant would be unable to
6 obtain comparable evidence by other reasonable means.” *Id.* at 489. Applying this two-part test,
7 the Supreme Court held that the Due Process Clause did not require the state to preserve breath
8 samples for later defense testing in order to introduce the results of breath analysis tests at a drunk
9 driving trial.

10 In *Arizona v. Youngblood*, 488 U.S. 51 (1988), the Supreme Court held that if the
11 prosecution merely fails to preserve evidentiary material that was “potentially useful evidence,”
12 due process is not violated unless a criminal defendant can show bad faith on the part of the police.
13 In *Youngblood*, the defendant was charged with child molestation, sexual assault and kidnapping
14 and claimed his due process rights were violated because police failed to refrigerate a sexual
15 assault victim’s clothing containing semen samples during the six weeks between the crime and
16 defendant’s arrest. The Supreme Court held that the Due Process Clause did not require the state
17 to preserve semen samples that might have been useful to prove that the defendant was not the
18 assailant, even though the defendant’s primary defense was that the victim mistakenly identified
19 him as the assailant. The *Youngblood* decision reiterated that the good or bad faith of the state is
20 irrelevant in a case in which the prosecution fails to disclose material exculpatory evidence. *Id.*
21 However, it concluded that the Due Process Clause requires a different result when the state fails
22 to preserve evidentiary material that could have been subjected to tests, “the results of which might
23 have exonerated the defendant.” *Id.* The court concluded that the failure of police to preserve
24 such “potentially useful evidence” did not constitute denial of due process “unless a criminal
25 defendant can show bad faith on the part of the police.” *Id.* at 58.

26 In *Illinois v. Fisher*, 540 U.S. 544, 547 (2004), the Supreme Court clarified that the
27 “applicability of the bad faith requirement in *Youngblood* depended not on the centrality of the
28 contested evidence to the prosecution’s case or the defendant’s case, but on the distinction between

1 ‘material exculpatory evidence’ and ‘potentially useful evidence’.” Where the government fails
2 to preserve evidence that is only “potentially useful,” no due process violation occurs unless a
3 defendant shows the government acted in bad faith. The *Fisher* decision explained that the reason
4 the Supreme Court had adopted the bad faith requirement was “to limit the extent of the police’s
5 obligation to preserve evidence to reasonable grounds and confine it to that class of cases where
6 the interests of justice most clearly require it.” *Id.* (internal citations omitted).

7 *United States v. Del Toro-Barboza*, 673 F.3d 1136 (9th Cir. 2012), involved a prosecution
8 for bulk cash smuggling and failing to file financial reports on exporting monetary instruments.
9 Border patrol officers found \$500,00 in cash in a box in the back of the defendants’ vehicle during
10 a secondary border screening. The Ninth Circuit held that the government’s failure to preserve the
11 box containing the money and the cash did not violate the defendant’s due process rights. The
12 defendants applied for and received an order to preserve the box containing the money and the
13 cash before trial. The defendants filed a motion to dismiss because the cash and box were not
14 preserved. The district court held a hearing and denied the motions concluding that the evidence
15 was not exculpatory. The Ninth Circuit affirmed finding that the box and the cash within it were
16 not materially exculpatory, and that the exculpatory nature of the money or the box was not
17 apparent to the officers at the time they failed to preserve. Because the evidence was not materially
18 exculpatory, the defendants were required to show bad faith. The Ninth Circuit upheld the district
19 court’s determination that there was no bad faith because the evidence had been lost before any
20 motions were made. Although the Ninth Circuit believed it might have been a better practice for
21 the government to have retained both the box and the cash for the defendants to test, it found the
22 destruction was not bad faith, which requires more than mere negligence or recklessness. *Id.* at
23 1150 (citing *United States v. Flyer*, 633 F.3d 911, 916 (9th Cir. 2011)).

24 **II. Analysis**

25 Here, the government concedes that it engaged in hurried shredding activities on the
26 evening of April 11, and on the day of April 12, 2014, before BLM personnel left the incident
27 command post. Special Agent Klemon’s conducted an investigation when this motion was filed
28 and spoke to law enforcement personnel involved in the shredding. According to Kleman’s

1 declaration and investigation, the shredding was done because law enforcement feared the
2 impoundment site was about to be overrun by armed supporters of Cliven Bundy. Special Agent
3 Kleman's declaration describes what was destroyed and the reasons for the destruction of the
4 documents. The vast majority of these documents consist of duplicate copies of the confidential
5 operations plan and other confidential law enforcement sensitive information including the
6 identity, phone numbers and addresses of law enforcement personnel and contractors assisting in
7 the impoundment operation.

8 Some of the photographs supporting this motion contain scraps of handwritten material
9 which appear to contain some handwriting. Special Agent Kleman "was not able to determine
10 what those handwritten papers were from or what was written on them." The photos of the
11 shredded scraps taken by Bundy's defense investigator show bits of handwriting. The photographs
12 of the shredded documents do not show enough handwriting to support the conclusion that the
13 shredded materials consisted of handwritten notes or written statements of witnesses. There are a
14 few small bits of paper that look like parts of handwritten words or initials. However, neither the
15 photographs, nor the supporting declaration of Bundy's investigator, establish that handwritten
16 notes, let alone handwritten percipient witness statements, were shredded.

17 Bundy's suggestion that the shredded materials contained written statements of witnesses
18 because documents were authored by BLM personnel involved in the course of the BLM operation
19 is pure speculation. His suggestion that handwritten notes may have contained indications of the
20 state of mind of agents during the events, which may be exculpatory, is also purely speculative.
21 Bundy has not met his burden of establishing the government knew the documents that were
22 shredded just before the command post was abandoned had apparent exculpatory value at the time
23 the materials that were shredded. Special Agent's Kleman's declaration attests that the documents
24 that were shredded were duplicate copies of the operations plan, and other sensitive law
25 enforcement information.

26 Bundy has also not shown that the documents that were shredded were potentially useful
27 to his defense, or that he is unable to obtain comparable evidence by other reasonable means. He
28 will be able to cross-examine any witness the government calls at trial and inquire whether the

1 witness made any handwritten notes or statements, whether they were preserved, and if so, what
2 they were, whether they were kept or preserved, and if not, why not. His motion, which is
3 supported by the declaration of a defense investigator who obtained the shredded documents 28
4 months after they were shredded based on the investigator's "information and belief" that the bags
5 were kept securely under lock and key by an unidentified source and "remain in the same state" is
6 also not sufficient to warrant an evidentiary hearing. He has not established contested issues of
7 fact that warrant taking testimony from all of the senior dispatch personnel, and senior members
8 of law enforcement command staff involved in shredding the documents the night before and day
9 BLM abandoned the site on the theory that only an evidentiary hearing will establish the truth of
10 Special Agent Kleman's sworn declaration.

11 With respect to his request for a remedial jury instruction, the Ninth Circuit has held that
12 if the government was negligent in failing to preserve exculpatory evidence, a defendant may be
13 entitled to an adverse inference instruction. *United States v. Sivilla*, 714 F.3d 1168 (9th Cir. 2013).
14 There, the defendant was stopped at the border in a Jeep crossing from Tijuana into San Diego
15 County. During a secondary inspection, an inspector noticed the engine manifold appeared to be
16 hand cut. Cocaine and heroin worth \$160,000 were found hidden inside the manifold by a contract
17 mechanic. The case agent took photographs of the engine area of the car and the packages
18 containing the drugs. However, the photographs were of poor quality. The drugs and their
19 packages were preserved. Five days after the defendant's arrest, his counsel requested that the
20 government preserve evidence seized from the Jeep. The government indicated it would do so
21 until counsel could arrange for an inspection of the evidence. Counsel also obtained a court order
22 for the government to preserve the vehicle. While the Jeep was in custody of the Department of
23 Homeland Security, it was forfeited and sold the day after the order was signed. A year later,
24 counsel for the defendant requested an opportunity to inspect the vehicle. Newly appointed
25 counsel became aware that the Jeep had been sold and filed a motion in limine for sanctions for
26 destruction of evidence. The district court denied the motion to dismiss and alternative request for
27 an instruction to the jury that defense counsel had not had an opportunity to inspect the vehicle
28 because the government failed to preserve it in violation of a court order.

1 On appeal, the Ninth Circuit affirmed denial of the motion to dismiss finding the district
2 court did not clearly err in finding that the government did not act in bad faith by destroying the
3 evidence. The exculpatory value of the Jeep was not obvious, and although the government was
4 negligent in failing to preserve the evidence, the defendant was unable to establish that the
5 government's action rose to the level of bad faith required for dismissal under *Youngblood*.
6 However, the Ninth Circuit clarified that, although bad faith must be shown to warrant dismissal
7 on due process grounds, this is not the correct legal standard for a remedial jury instruction.

8 In determining whether a remedial jury instruction should be given, courts must balance
9 "the quality of the Government's conduct" against "the degree of prejudice to the accused." *Id.* at
10 1173. The government bears the burden of justifying its conduct, and the defendant bears the
11 burden of demonstrating prejudice. *Id.* In evaluating the government's conduct, the court should
12 inquire: (1) whether the evidence was lost or destroyed while in the government's custody; (2) the
13 government acted in disregard for the interests of the accused; (3) whether the government was
14 negligent in failing to adhere to established and reasonable standards of care for police and
15 prosecutorial functions; (4) if the acts were deliberate, whether they were taken in good faith or
16 with reasonable justification; and (5) whether government attorneys prosecuting the case
17 participated in the events leading to the loss or destruction of the evidence. *Id.*

18 The *Sivilla* court found that the evidence was destroyed while in the government's custody
19 and the government was negligent in failing to adhere to reasonable standards of care in its
20 prosecutorial functions. The prosecutor had promised to protect the evidence, but failed to take
21 any affirmative action to do so. In assessing the prejudice to the defendant, the Ninth Circuit
22 directed the trial courts to evaluate a wide number of factors including: (1) the centrality of the
23 evidence to the case and its importance in establishing the elements of the crime or the motive or
24 intent of the defendant; (2) the probative value and reliability of the secondary or substitute
25 evidence; (3) the nature and probable weight of factual inferences or other demonstrations and
26 kinds of proof allegedly lost to the accused; and (4) the probable effect on the jury from the absence
27 of the evidence, including dangers of unfounded speculation and bias that might result to the
28

1 defendant if adequate presentation of the case requires explanation about the missing evidence.
2 *Id.* at 1173–74.

3 Because the defendant sought to use his inspection of the Jeep to rebut the prosecution's
4 argument that he must have known that the drugs were in the Jeep because of how long and
5 involved a process it was to remove them from the car, the court found prejudice. The government
6 introduced testimony of an officer to prove this point. The photographs were the only substitute
7 evidence available to rebut the arguments and were inadequate because they were of poor quality.
8 The Ninth Circuit found that any expert witness presented with only the photographs would have
9 concluded next to nothing could be determined from them. The defense's expert witness for
10 hidden compartments in vehicles needed access to the vehicle itself rather than poor quality
11 photographs to present the defendant's only defense that he did not know the drugs were in the
12 car. Thus, the Ninth Circuit found the prejudice to the defendant was significant, and that a
13 remedial jury instruction was warranted. It reversed in part, and remanded the case for a new trial
14 with instructions to grant the defendant a remedial jury instruction.

15 Here, it is undisputed that the documents were shredded while in the government's custody,
16 and that the documents were deliberately shredded. However, the declaration of Special Agent
17 Kleman provided a reasonable and legitimate reason for shredding the documents, which were
18 duplicate copies of the operations plan and other sensitive law enforcement confidential
19 information including the identity and contact information for law enforcement officials and
20 contractors involved in the impoundment operation. Shredding is one of two approved methods
21 of destroying CJI information pursuant to DOJ policy. There is no evidence the documents were
22 shredded in violation of any prosecutorial policy or standards. Although the parties dispute who
23 was at fault for the events leading up to BLM abandoning the site, no one disputes that BLM
24 abandoned the impoundment site because it was in imminent danger of being overrun. In short,
25 the court finds the government has met its burden of justifying its shredding of the documents.

26 Bundy has not established that the shredded documents were central to his case or
27 important in establishing the elements of the crimes with which he is charged. His arguments that
28 because the documents that were shredded were authored by BLM agents and therefore are

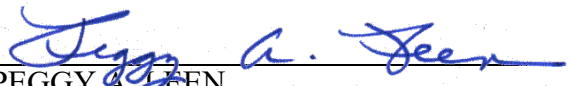
1 necessarily witness statements that might be exculpatory in that they might contain evidence of
2 the state of mind of government officials is based on *ipse dixit* and unsupported. He will be able
3 to cross examine witnesses who testify in this case and present evidence that documents were
4 shredded. The court finds he has not met his burden of establishing prejudice. However, the court
5 will recommend denial of his motion for an adverse inference instruction without prejudice should
6 further investigation or evidence developed during trial support one.

7 Accordingly,

8 **IT IS ORDERED:** the Motions for Joinder by Defendants Stewart, Mel Bundy, Payne,
9 McGuire, Parker, Cliven Bundy, Woods, and O'Shaughnessy (ECF Nos. 859, 860, 861, 873, 883,
10 890, 899, 904) are **GRANTED**.

11 **IT IS RECOMMENDED** that Ammon Bundy's Motion to Dismiss the Indictment for
12 Destruction of Evidence (ECF No. 833) be **DENIED without prejudice** to requesting a remedial
13 adverse inference instruction should further investigation or evidence developed during trial
14 support one.

15 DATED this 30th day of December, 2016.

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18 PEGGY A. ZEEN
19 UNITED STATES MAGISTRATE JUDGE
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